"kepala" or other lesser job has also been turned down. For the above reasons and taking into consideration other contingencies, I assess the loss of his future earning at $130 per month. At the time of accident, the plaintiff was forty seven years old. Taking his expectation of life at sixty and deducting the period of twelve months during which he was hospitalised up to the time he was fitted with the artificial limb, I would calculate his loss of earnings at $130 per month on twelve years purchase, which comes to $13,821.60. As a round figure, for loss of earnings, I assess a sum of $13,820. As regards pain and suffering for the two injuries and all the disadvantages arising from his disablement including loss of amenities and embarrassments, my assessment would be $20,000. In making these assessments, I have taken into consideration the various authorities cited in the judgment of the Federal Court in *United Plywood and Sawmill Ltd.* v. *Lock Ngan Loi*[7] where a sum of $35,000 awarded as general damages for loss of left arm to a twenty two year-old general labourer earning between $85 and $90 per month was reduced to $27,000 on appeal. I have also taken into consideration the Singapore case of *Van der Velde* v. *Lim Seow Tat & Anor.*[8] where a thirty two year-old bank officer earning $1,000 to $1,200 per month was awarded $45,000 general damages for loss of right arm halfway between the elbow and the shoulder. Although in that case, the plaintiff's promotion prospects were not impaired and his salary since the accident had been increased by normal increments, consideration should also be taken of the following facts:—

(a) the plaintiff in the present case was forty seven years old at the time of accident;

(b) his income was only about half of that of the bank officer;

(c) he lost his left arm instead of right arm.

Taking the above two cases as rough guides, in my view, it is fair and reasonable to assess a sum of $33,820 as general damages in this case.

As regards special damages, in the absence of rebutting evidence, I accept the evidence of the plaintiff as supported by Exhibit P2 that he was earning a minimum of $500 per month. I take this as his average income. For loss of income from March 27, 1967 to the date when his wounds were completely healed and his left arm fitted with artificial limb — a period of twelve months — I award a sum of $6,000. In the absence of documentary proof, I would not allow anything on private medical treatment, but I would allow only $350 for expenses incurred on nourishing food. I would allow $240 for travelling expenses for the plaintiff's family and also $10 for cost of the medical report. The total amount for special damages is therefore $6,000.

As I have found the plaintiff to be 25% to blame, I therefore give judgment for the plaintiff against the first and second defendants as follows:—

(a) Special Damages — $4,950;

(b) General Damages — $25,365;

(c) Costs.

Judgment for the plaintiff.

Solicitors: *S. A. Lingam & Co.; Allen & Gledhill; Shearn, Delamore & Co.*

WENG LOK MINING CO. LTD. v. HIAP LEE (CHEONG LEONG & SONS) BRICKMAKERS LTD.

[F.C. (Azmi L.P., Suffian and Ali F.JJ.) December 31, 1971]

[Kuala Lumpur — Federal Court Civil Appeal No. 34 of 1971]

Tort — Negligence — Rule in Rylands v. Fletcher — Nuisance for escape of water from reservoir — Liabilities.

This was an appeal from the judgment of the High Court, Kuala Lumpur, whereby the appellants/defendants, a mining company, were held liable for negligence, liable under the rule in *Rylands* v. *Fletcher*[1], and liable in nuisance for the escape of water from a reservoir on their land.

The respondents, a brick-making firm, were awarded $3000 in general damages and costs. Their claims for special damages amounting to $19,713, and for an injunction, were dismissed because they "were characterised by the poor quality of evidence tendered and the general lack of proof".

This appeal was against the whole of the decision of the trial court.

Held, allowing the appeal: (1) for the rule in *Rylands* v. *Fletcher*[1] to apply in this case there must be proof of escape of water;

(2) the respondents' evidence failed to establish any of the liabilities alleged against the appellants.

Cases referred to:-

(1) *Rylands* v. *Fletcher* (1868) L.R. 3 H.L. 330.

(2) *Read* v. *Lyons & Co. Ltd.* [1947] A.C. 156.

(3) *Hoon Wee Thim* v. *Pacific Tin Consolidated Corporation* [1966] 2 M.L.J. 240.

(4) *Smith* v. *Kenrick* (1849) 7 C.B. 515; 137 E.R. 205.

(5) *Baird* v. *Williamson* (1863) 15 C.B. (N.S.) 376; 143 E.R. 831.

FEDERAL COURT.

S. D. K. Peddie for the appellants.

S. B. Menon for the respondents.

Azmi L.P.: I have the opportunity of reading the judgment of my brother Ali F.J. and agree with him that the appeal should be allowed for reasons stated by him.

The respondents will therefore pay the costs of this appeal and of the trial in the court below. The deposit of $500 will be returned to the appellants.

Ali F.J.: This is an appeal from the judgment of the High Court, Kuala Lumpur, whereby the appellants, a mining company, were held liable for negligence, liable under the rule in *Rylands* v. *Fletcher*,[1] and liable in nuisance for the escape of water from a reservoir on their land. The respondents, a brick-making company or firm, were awarded $3,000 in general damages and costs. Their claim for special damages amounting to $19,713 in respect of five items of loss was dismissed. The reasons for the dismissal was stated by the learned trial judge in these words:

"... these claims were characterised by the poor quality of evidence tendered and the general lack of proof." A

The claim for injunction, apparently, was also dismissed. This appeal is against the whole of the decision of the trial court.

From the grounds of appeal, it would seem clear to me that the appeal is substantially against the trial court's findings of facts necessary to establish liability B under each head of tort just referred to. Our attention was drawn to the oral evidence of witnesses and the various photographs on which those findings were clearly based. The appellants' counsel criticised some passages from the judgment which reflect those findings. Our task in this dispute was made even more difficult by the fact that both counsel could not see C eye to eye as to the real issues of fact involved for the consideration of the trial court. The arguments relating to the left bund, for example, proceeded on different understandings as to its contribution to the escape of water. Be that as it may, it is necessary to decide this appeal.

It would be convenient to start with the finding D relating to the escape of water. This is important in many respects. For the rule in *Rylands* v. *Fletcher, supra,* to apply there must be proof of escape. It is sufficient to refer only to the decision in *Read* v. *Lyons & Co. Ltd.*[2] As regards negligence, unless there is proof that damage or loss suffered by the respondent E was caused by the escape of water from the appellants' land, I do not think that the latter can be held liable. Similarly, the proof of escape is necessary in nuisance in so far as it is material to show that it amounted to an invasion of the respondents' enjoyment of their land. The case for the respondents on the pleadings is clear enough. It speaks of a "reservoir" containing "such volume" of water F "bursting" and the escape of water which caused the flood on their land sometime in April 1965. Only the respondents' servants or agent claimed to have seen the flood when it occurred. It was not reported to the appropriate authority or authorities who might have the means or expertise to ascertain its real cause. PW1 and PW6 who claimed to have personally noticed G the escape of water clearly did not impress the learned trial judge who came to his finding on this fact from other evidence, *i.e.* the plaintiffs' surveyor, evidence of defence witnesses particularly, DW1, DW4, DW8, and evidence of the photographs. But all these relate to what was found or seen after the occurrence of the flood when traces of sand, tailings and water could H still be seen in the area. The learned trial judge also relied on the existence of the two bunds which, he held, were constructed by the appellants to prevent "further escape of water" from their land. As I understand the judgment, heavy rain also contributed to the escape of water; but his Lordship referred to the Federal Court decision in *Hoon Wee Thim* v. I *Pacific Tin Consolidated Corporation*[3] for the view that heavy rainfall cannot be pleaded as an act of God to support a defence. With respect, the facts in that case as found by Gill J. (as he then was) were entirely different from the facts of the present case. In the former the reservoir was constructed on a high ground to supply water to the dredge paddock and the senior inspector of mines, who also gave evidence in the present case, had testified to the effect that the construction of the reservoir was not in accordance with general mining practice. Mr. Curtis, in the present case, had said that as far as he could remember when he visited the area sometime in January 1965 everything seemed to be in order. The so-called reservoir as found by the learned trial judge in this case was in fact a mining pool which had come into existence as a result of mining operations carried out by the appellants and the previous occupiers of the land. There was no evidence of the height of the water level in the pool at the material date or dates. The learned trial judge said so. In his judgment he said:

"... The fact that the level of water was not given in evidence is of little effect to the plaintiffs' claim. Though the actual date of the happening was not given, it does not defeat the plaintiffs' claim since there is *overwhelming* evidence to show that there was an escape of water causing damage to the plaintiffs' land..."

So far as his finding on escape was based on inferences drawn from evidence of witnesses and photographs I am not prepared to agree that there was overwhelming evidence in the sense that the flood on the respondents' land could only have been caused by water escaping from the appellants' land. In my view it is important to know the height of water level in the mining pool on or before the date of the flood. Without such evidence the possibility or probability of the flood being caused by water flowing from other places or directions cannot be disregarded. Indeed, in this case the appellants sought to invite such a suggestion by calling evidence to show that the amount of water which they used for their circulating system was not sufficient to cause the flood even if it escaped. It was in this context they admitted that there was water on their land. Up to a point there would be justification for the view that they were maintaining some sort of reservoir or pool on their land. Miners have to have water for their circulating system; otherwise it would be extremely difficult or uneconomical for them to extract the ores from the earth. The evidence of the senior inspector of mines would fairly suggest that this is normal mining practice. Were it otherwise mining operations would always be exposed to claims for damages by owners of neighbouring lands. The principle in *Smith* v. *Kenrick*,[4] I think, was designed to prevent such claims. The decision in *Hoon Wee Thim* v. *Pacific Tin Consolidated Corporation, supra,* was more in line with that reached in *Baird* v. *Williamson.*[5] Two two English cases cited served as illustrations in the judgment of Lord Cairns, L.C. in *Rylands* v. *Fletcher, supra.* (See also the judgment of Lord Cranworth). The learned trial judge in *Hoon Wee Thim's* case, *supra,* also referred to these illustrations. In all the cases just referred to, the facts leading to the findings of liability or non-liability were beyond dispute. Here high sounding words were used in the respondents' statement of claim to make it appear that the facts were substantially the same. But the poor quality of the respondents' evidence at the trial failed to measure up to these words. I would sum it all up by saying that the respondents'

evidence failed to establish any of the liabilities alleged against the appellants.

Accordingly, I would allow this appeal with costs here and below.

Suffian F.J. concurred.

Appeal allowed.

Solicitors: *Skrine & Co.; Shearn, Delamore & Co.*

CHAMPION MOTORS (M) SDN. BHD. v. NORASHIKIN

[F.C. (Suffian, Ali and Ong Hock Sim F.JJ.) December 31, 1971]

[Kuala Lumpur — Federal Court Civil Appeal No. 60 of 1971]

Hire-purchase — Motorcar — Indemnity of owners — Vehicle insured with owners' official insurers — Failure to obtain cover against loss by civil commotion — Waiver.

Insurance — Motorcar under hire-purchase — Owners' official insurers — Loss by civil commotion excepted — Defence of waiver — Whether owners protected by saving clause.

This was an appeal against the decision of the High Court ([1971] 2 M.L.J. 217). The facts appear sufficiently from the judgment of Ali F.J.

The basis of the appellants' claim was that there was a breach of clause 8 of the hire-purchase agreement, the general effect of which was to impose on the respondent a liability to have the car insured against loss "from whatever cause arising".

The policy of insurance was issued by the official insurers of the appellants who knew or had reason to know that it did not cover loss arising from civil commotion. The insurance policy, on expiry, was renewed for the second year by the respondent on terms substantially similar to those contained in the expired policy. It was during the currency of the renewed policy that the loss occurred.

The appellants sought to be compensated for the loss by the respondent on the ground that she failed to have the car insured against civil commotion. The main defence was waiver. The respondent claimed that the appellants had agreed or consented to accept the policy as sufficient for the protection of their interests in the car.

Held, dismissing the appeal: although clearly there was a breach by the respondent of her obligation, but as the policy had all been arranged by the appellants with their own official insurers, it would be reasonable to infer that they had waived that breach, and for that reason they should bear the loss.

Case referred to:-

(1) *Barrett Bros. (Taxis) Ltd.* v. *Davies* [1966] 1 W.L.R. 1335.

The following cases were cited in argument: *A.E. Farr Ltd.* v. *Admiralty* [1953] 1 W.L.R. 965; *Akerib* v. *Booth* [1960] 1 W.L.R. 454; *Besseler Waechter Glover and Co.* v. *South Derwent Coal Co. Ltd.* [1938] 1 K.B. 408; *Pahang Lin Siong Motor Co. Ltd. & Anor.* v. *Kartar Singh* [1969] 1 M.L.J. 139; *Anglo-American Corp. (M) Sdn. Bhd.* v. *Dato Phua Cheng Leong* [1969] 2 M.L.J. 12, 15-16; *Barton* v. *Fitzgerald* 104 E.R. 944; *Cholmondeley* v. *Clinton* 37 E.R. 527; *Solly* v. *Forbes* 129 E.R. 871; *Coniers* v. *Holland* 74 E.R. 488; *Cook* v. *Newcomb* 83 E.R. 24; *Birmingham and District Land Co.* v. *L. and N.W. Ry* (1888) 40 Ch. D. 268 at p. 285, 286; *Salisbury* v. *Gilmore* [1942] 1 All E.R. 457; *Central London Property Trust Ltd.* v. *High Trees House Ltd.* [1947] K.B. 130; *Charles Rickards Ltd.* v. *Oppenheim* [1950] 1 All E.R. 420 at p. 423; *Plasticomda Societa Per Azion* v. *Davidsons* [1952] 1 Lloyd's Rep. at p. 538, 539; *Sarat Chunder Dey* v. *Gopal* I.L.R. 20 Cal. 296.

FEDERAL COURT.

A. D. Rajah for the appellants.

Raja Abdul Aziz Addruse (*Yaacob Hussein Merican* with him) for the respondent.

Suffian F.J.: I have had the advantage of reading in draft my brother Ali's judgment and with respect I agree with him that this appeal should be dismissed — in other words I agree that the loss of this car should be borne by Champion Motors, its owners (plaintiffs-appellants).

The whole appeal in my view turns on clause 16 of the hire-purchase agreement. That clause consists of two sentences. The first sentence without more would have made the defendant-hirer (respondent) clearly liable for the loss. But its effect has been cut down by its first sentence. That sentence clearly means that notwithstanding the second sentence Champion Motors may at any time waive a breach by the defendant of her obligation to insure the car against loss in civil commotion, but that waiver cannot excuse a subsequent breach: it excuses only the one breach. Here clearly there was a breach by the defendant of her obligation, but as the policy had all been arranged by Champion Motors with their own official insurers, it would be reasonable to infer and I do infer that Champion Motors had waived that breach.

That policy was for a year, and when it was about to expire on 25th December, 1968, it was renewed by the defendant for another year, and it was during the currency of this renewal period that the car was destroyed. The evidence as to who renewed it was very sketchy. The defendant said in evidence that it was she who renewed it, and there was no evidence that the renewal was done through the intervention of Champion Motors. But I think that it is reasonable to infer that Champion Motors who knew that the policy for the first year did not cover loss from civil commotion must have known from their experience in the motoring world that the defendant at the end of the first year would have renewed it on the old terms. Yet, knowing all that, they did not under clause 8 of the agreement effect the necessary policy themselves and charge the premium to the defendant, which they had a right to do. In the circumstances I think that it is reasonable to infer that Champion Motors must have again waived a breach by the defendant of her obligation to insure the car against loss from civil commotion.

For the above reasons I would hold that Champion Motors should bear this loss. They should also pay costs here and in the courts below.

Ali F.J.: The dispute in this appeal arose out of the disturbances which occurred on May 13, 1969. A car owned by the appellants, a firm of motor dealers in Kuala Lumpur, was hired out to the respondent under a hiring or hire-purchase agreement. It was burnt or destroyed during the disturbances which, the parties in this appeal agree, were in the nature of a civil commotion. On the date of the agreement the